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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 412

GREAT LAKES DREDGE & DOCK COMPANY, A CORPORATION, PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the District Court (R. 79–83) is not officially reported. The opinion of the Circuit Court of Appeals (R. 125–129) is reported at 149 F. 2d 9.

JURISDICTION

The opinion of the Circuit Court of Appeals was filed April 24, 1945. A petition for rehearing was denied June 9, 1945. The petition for a writ

of certiorari was filed on September 8, 1945. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code.

QUESTION PRESENTED

Whether petitioner's dredgeworkers are employed as seamen within the meaning of Section 13 (a) (3) of the Fair Labor Standards Act and are therefore exempt from the overtime provisions of the Fair Labor Standards Act.

STATUTORY PROVISIONS INVOLVED

Section 13 (a) (3) of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. 201) provides that:

> The provisions of sections 6 and 7 shall not apply with respect to * * * (3) any employee employed as a seaman.

STATEMENT

This suit was instituted by the Administrator of the Wage and Hour Division to enjoin petitioner from violating the overtime provisions of the Fair Labor Standards Act. The facts were largely stipulated (R. 8–28). As stipulated and as revealed in the testimony and found by the District Court (R. 83–95), they are as follows.

Petitioner is engaged in the business of marine construction (R. 9). It constructs, repairs, alters, reconstructs and otherwise performs work on breakwaters, sea walls, docks, locks, levees, seaplane ramps and other similar types of marine

projects (*ibid.*). It also dredges, widens, clears, fills, and otherwise performs work on channels in navigable inland waters and harbors, including those located in and on the Great Lakes, connecting and tributary waters, rivers, and canals (*ibid.*). In the performance of the various types of marine projects, petitioner owns and operates tugs, dredges, drill boats, launches, scows, and dispatch boats (R. 10).

Petitioner operates three types of dredges, known as hydraulic dredges, dipper dredges, and clamshell dredges. The hydraulic dredges, varying in gross tonnage from 559 to 1,832 tons, contain centrifugal pumps through which soil and other material from the bottom of the lake, river, or canal is sucked into discharge pipes. This material is then discharged either into scows or on to the banks. (R. 12–13.) The dipper dredges, varying from 434 tons to 959 tons' displacement, contain a boom to which is attached a dipper or scoop similar to that on steam shovels (R. 15–16). The clamshell dredges, varying in tonnage from 123 to 721 tons, contain booms to which are attached "clamshell buckets" which are lowered and raised by cables. The material is discharged from the dipper or the clamshell bucket into scows. (R. 17–18.)

The dredges are "enrolled" but are not inspected under any of the Federal maritime statutes or regulations (R. 39, 43, 92). They have no motive power of their own (R. 13, 37). When located at the scene of dredging operations, they

are anchored to the bottom by columns called "spuds" (R. 13, 15, 17). These spuds can be maneuvered in connection with the dipper or clamshell bucket so that the dredge may be moved ten or fifteen feet as dredging operations proceed. But the dredges are transported by tugs to the scene of operations, remain at a fixed station until a job is finished (in some cases two or three years) (R. 57), and are then towed to another digging site or to a yard to await a new assignment.

During the course of a tow, the tug crew is in complete charge of navigation (R. 40, 75). It consists of a licensed master, a licensed engineer, and on tugs of 100 net tons or more, of a complement of certificated able-bodied seamen (R. 11, 12). None of the dredge employees, however, is required by the Federal maritime statutes or by petitioner to have a seaman's rating (R. 39, 48, 52, 92), except that the dredge captain must be familiar with the navigation laws and with river, port and harbor regulations (R. 14, 16, 18). The dredge captain signals to the tug captain or answers the tug captain's signals to the end that the latter may acquit his responsibilities (R. 42).

Many of petitioner's employees maintain living quarters in Chicago. When a dredge is operating close to that city, those stationed upon it frequently sleep and eat ashore. (R. 40.) Transportation to and from the dredges is provided by defendant's motor launches (R. 23). When a dredge is stationed elsewhere the employees eat

and live aboard the dredge (R. 14, 40). The company deducts the cost of the meals from the pay of the men (R. 39, 60). Some of the dredges, however, do not have eating and sleeping facilities (R. 14, 39, 47). The employees work eight-hour shifts and are compensated at hourly rates, being paid straight time for a 48-hour week (R. 23–24, 92). The deckhands, firemen, oilers and scowmen are members of the International Dredge Workers Protective Association (R. 67); the captains, operators, cranemen, and engineers are members of the International Longshoremen's Association (R. 73–74).

At the trial it was conceded by the Government that the employees who work on petitioner's tugs are seamen and are exempt from the overtime provisions of the Fair Labor Standards Act (R. 32). Certain construction employees, on the other hand, are concededly covered by the Act (R. 27). The District Court, which entered a judgment in favor of the Administrator, enjoined overtime work without overtime pay as to petitioner's "dredging employees who are employed on its dredges" (R. 98), referred to in the opinion as "employees * * * * who may generally be described as dredgemen" (R. 79). These include the normal complement of a dredge, consisting of from 8 to 13 men on a normal eight-hour shift. In addition to the dredge captain, there are a chief engineer, fireman or electrician, operator, deck foreman, deckhands, oilers, cooks, mess-boys, and porters. (R. 86,

13–15, 16–19.) Some deckhands are assigned partially to work on scows which carry excavated material to the dumping ground or bring coal, water or supplies to the dredge, but they are under the orders of the dredge captain and are quartered with the crew of the dredge during the performance of work which requires the men to live on the dredge (R. 20, 92). They are regarded as deckhands on the dredge (R. 20).

Upon appeal by petitioner from the District Court's judgment, the Circuit Court of Appeals affirmed (R. 130), entering an opinion (R. 125–129) which holds with the District Court that "men employed on a dredge" are not seamen within the meaning of Section 13 (a) (3) of the Fair Labor Standards Act.

ARGUMENT

The question presented by the petition for certiorari in this case is the same as that in *Bay State Dredging and Contracting Co.* v. *Walling,* No. 413, this Term. The Court is respectfully referred to the respondent's brief in opposition in that case for a discussion of certain relevant points which are raised in the Bay State Company's petition and not in the present petition.

The considerations which are involved in this case and in No. 413 are similar to those in *Manhattan Lighterage Corporation* v. *Anderson et al.,* No. 121, this Term,[1] in which a memorandum has

[1] Certiorari denied October 8, 1945.

been filed on behalf of the Administrator of the Wage and Hour Division as *amicus curiae*. The Court is respectfully referred to that memorandum for a fuller discussion of the question of law involved than need be presented here. The *Manhattan Lighterage Corporation* case involves the question whether the word "seaman" in Section 13 (a) (3) of the Fair Labor Standards Act includes the "captains" of certain cargo lighters operating in New York Harbor, whose duties relate to the loading and unloading of freight. The present case and No. 413 involve the same question with respect to dredgeworkers in the employ of the petitioners.

It is pointed out in the Administrator's brief *amicus* in the *Manhattan Lighterage* case (pp. 7–11) that the purpose of the seaman's exemption in Section 13 (a) (3) of the Fair Labor Standards Act is threefold: (1) to avoid conflict between the Fair Labor Standards Act and regulations adopted by the Maritime Commission with reference to employees on vessels which receive differential subsidies from the Government, (2) to avoid the difficulties which would be involved in adjusting to the Fair Labor Standards Act the arrangements whereby shipowners supply food and quarters to seamen on vessels engaged in transportation and (3) to exempt those maritime workers whose hours and duties aboard ship are such that the provisions of the Act cannot reasonably be applied to them. Seamen within the meaning

of the exemption are for the most part provided with protections respecting employment which are now contained in Chapter 18 of Title 46 of the United States Code. See *Norton* v. *Warner Co.*, 321 U. S. 565, 570–571.

As in the case of the lighter captains involved in the *Manhattan Lighterage Company* case, the employees of the petitioner, unlike seamen, are paid hourly wages, are not furnished meals at the expense of the employer, and are not bound to the vessel in the manner of seamen. Their duties are confined instead to work on an eight hour shift each day, with freedom on their part to be absent at other times so far as circumstances permit; and they are paid by the hour for the time they spend at work. Hence the exemption of these dredgeworkers from the Fair Labor Standards Act is not required to accomplish the Congressional purpose in providing for the exemption of seamen. The principle which forbids the broadening of exclusions from this remedial statute (*Phillips Co.* v. *Walling*, 324 U. S. 490, 493), is fully operative. The Act supplies protections which dredge workers need as fully as other employees in interstate commerce and in the production of goods for commerce, to whom the Act applies and whose employment arrangements are similar.

It is true that dredgeworkers have been accorded the benefits of certain other legislation applicable to the operating employees of vessels en-

gaged in transportation, as appears more fully from our brief in opposition in No. 413, at pp. 6–9. As both the court below (R. 182) and the Circuit Court of Appeals for the First Circuit in the *Bay State Dredging Co.* case (No. 413, R. 25–27, 31–32) recognized, however, the meaning of the word "seaman" must be considered in relation to the purposes of the statute in which it is used (*Warner* v. *Goltra,* 293 U. S. 155, 158), and it is of little significance that it or similar words, used in other contexts and for other purposes, may embrace dredgeworkers.

In *Ellis* v. *United States,* 206 U. S. 246, this Court held that the Act of August 1, 1892, c. 352, 27 Stat. 340, which restricted the employment of "laborers and mechanics" upon public works of the United States to eight hours in a calendar day, did not apply to dredgeworkers, and the Court suggested in its opinion that such workers should be classified as seamen. There was a sharp dissent, however, and Congress later amended the statute to include persons performing "services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor." Act of March 3, 1913, c. 106, 37 Stat. 726, 40 U. S. C. 321. The change was made for the purpose of overcoming the effect of the *Ellis* decision. The committees reporting the bill expressly stated (S. Rep. 1056, 62d Cong., 2d sess., p. 5; H. Rep. 910, 62d Cong., 2d sess., p. 5):

> It is generally conceded by all fair-minded men that the [Act of 1892] was intended to cover the kind of work for which this bill (H. R. 18787) provides, and it is only due to the fact that the decisions of the Supreme Court have taken dredge workers, etc., from under the provisions of the law of 1892 that the passage of this bill is desired.

The opinion in Congress that dredgeworkers were to be classified with laborers and mechanics was further emphasized on the floor by Senator Shively in support of the amendment (49 Cong. Rec. 1952):

> When that act [of 1892] became law no one dreamed that the words "laborers and mechanics" did not comprehend the dredge workers on Government work. There is certainly no language in the statute expressly excepting dredge workers from the operation of the act and none which would even remotely suggest any purpose to make them the subject of an exception. But when the case of *Ellis et al.* v. *United States* came on for decision in the United States Supreme Court in 1907, the court held that these dredge workers fall within the category of seamen and are subject to maritime jurisdiction, and do not fall within the description of "laborers and mechanics" under the act of 1892. This was done by regarding the work of the dredgeman in moving the dredge or scow rather than his work of excavation as the paramount func-

> tion of his employment, thus giving him the character of sailor and excluding him from the benefits of the act. In a minority opinion, three of the justices sharply dissented from the view of the majority on this point and insisted that whatever the dredgemen did in the nature of seaman's work was a mere incident to his employment in the work of excavation. From 1892 to 1907 it was believed by the Federal authorities that dredge workers were covered by the language of the act. * * * The bill * * * supplies a manifestly unintentional omission in the act of 1892.

Thus, long before the enactment of the Fair Labor Standards Act, Congress explicitly rejected the suggestion that dredgeworkers in respect to their hours of labor were to be classified with seamen. There is nothing in the legislative history to imply that the Fair Labor Standards Act is framed on a different policy. In the 1913 legislation, moreover, effect was given to the view that the classification of workers as between marine employment and other employment should turn upon the nature of their "paramount function[s]". This is the view embodied in the interpretation of the seaman's exemption by the Administrator (*infra*, p. 13), to which the court below gave effect (R. 128).

Petitioner argues (Pet. 5–6, 28–30) that there is a conflict between the decision of the court below and the decision of the Circuit Court of

Appeals for the First Circuit in *Walling* v. *Bay State Dredging and Contracting Co., supra,* in that the opinion in the latter case (No. 413, this Term, R. 26) states that "the scow or bargemen are admitted to be seamen", whereas the District Court judgment and opinion of the court below in the present case embrace these classes of employees. There is nothing in the record of the *Bay State Dredging and Contracting Co.* case to show that bargemen were conceded by the Administrator to be within the seamen's exemption. It seems entirely probable that the court was referring to scowmen who are not deck hands on dredges and whose duties relate largely to transporting excavated material or other material to and from the dredges. The sentence in the opinion preceding the one quoted states that "when the material excavated was dumped on scows, brought alongside the dredge, navigation and transportation then began." This is true, and it would be conceded that, as was the case in *Gale* v. *Union Bag and Paper Corporation,* 116 F. 2d 27 (C. C. A. 5), certiorari denied, 313 U. S. 559, (see also *Helena Glendale Ferry Co.* v. *Walling,* 132 F. 2d 616 (C. C. A. 8)) employees upon scows whose duties relate primarily to their movement from place to place should be regarded as seamen. The record upon which the decision of the First Circuit was predicated contains the following sentence in the agreed statement of facts (No. 413, R. 15): "Those employees desig-

nated by the defendant as *scowmen* performed their duties in part on the scow and in part on the dredge." Among their duties, which are enumerated immediately following, are those of assisting in the hoisting of the dredge spuds while the scow is tied to the dredge and cleaning the dredge decks.

At most, the statement of the Circuit Court of Appeals for the First Circuit creates, or perhaps recognizes, an ambiguity which may be resolved administratively and by the employer according to the nature of the duties of particular employees. It is clear from the opinions of both Circuit Courts of Appeals that dredging duties are not the duties of seamen, whereas duties connected with the movement of vessels, whether tugs, scows, barges, or other floating equipment, are. According to the applicable administrative interpretation to which reference has been made (*supra,* p. 11) "barge tenders on non-self-propelled barges who perform the normal duties of their occupation * * * are considered seamen within the exemption unless they do a substantial amount of nonexempt work. Loading and unloading and activites relative thereto will be considered nonexempt work."[2] This is the view which has been applied by the court below in the present case (R. 128). Under that view, the preponderance of duties of a particular employee

[2] Interpretative Bulletin No. 11, July 1939, revised July 1943, par. 6.

will determine whether or not he comes within the exemption. The court below and the Circuit Court of Appeals for the First Circuit have both rendered decisions which accord with the statute. There is no substantial conflict between them.

The larger question presented by both this case and No. 413, of whether dredgeworkers are seamen within the meaning of the exemption, is one upon which there is no conflict of decision and no conflict of rationale among the circuit courts of appeals in the cases involving related classes of workers. That question, we believe, does not call for review by this Court.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be denied.

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